

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**WALTERS BENDER STROHBEHN &
VAUGHAN, P.C.**

APPELLANT,

**v.
ELIZABETH A. MASON**

RESPONDENT.

DOCKET NUMBER WD71292
DATE: May 18, 2010

Appeal From:

Jackson County Circuit Court
The Honorable David M. Byrn, Judge

Appellate Judges:

Division Three: James M. Smart, Jr., Presiding Judge, Joseph M. Ellis and Gary D. Witt, Judges

Attorneys:

Stephen B. Millin, Jr., Kansas City, MO, for appellant.

Bernard T. Schmitt, Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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APPELLANT,

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Before Division Three Judges: James M. Smart, Jr., Presiding Judge, Joseph M. Ellis and Gary D. Witt, Judges

In October 2007, Michael Strohbehn, a named shareholder in Walters Bender Strohbehn & Vaughan, P.C. ("the Firm"), entered into a contingent fee agreement with Elizabeth Mason to assist Mason in representing a client in a case that was scheduled for trial in state court in New York in November 2007. Mason's juvenile client had a pending suit against the City of New York on a theory of "sexual abuse."

In November 2007, Strohbehn assisted Mason in prosecuting her client's case at trial. Strohbehn conducted the voir dire, made the opening statement, conducted the direct examination of an important witness, and conducted a *Frye* hearing. After several days of trial, a mistrial was declared by the Court.

In December 2007, Mason discharged Strohbehn from the case and informed him she was terminating the fee-sharing agreement between the parties. During the re-trial of this case in February 2008, Mason settled the underlying matter. Neither the Firm nor Strohbehn received any compensation for their services in the case.

The Firm subsequently filed this action against Mason, and Mason filed her Motion to Stay Or In The Alternative Dismiss. In her Motion, Mason alleged that Strohbehn had pursued litigation in New York in order to be compensated for his attorney's fees stemming from the underlying case. Various supporting documentation was attached to the motion in order to support Mason's theory that the instant Petition was barred by the doctrine of res judicata.

On June 18, 2009, the circuit court issued its judgment granting Mason's motion to dismiss and dismissing the Firm's Petition without prejudice. In so ruling, the trial court did not elaborate as to its reasoning. This appeal followed.

REVERSED AND REMANDED.

Division Three holds:

Notwithstanding the fact that the trial court dismissed the Firm's Petition without prejudice, this Court has jurisdiction to hear the instant appeal because when the effect of the judgment is to dismiss the plaintiff's action and not the pleading merely, then the judgment entered is final and appealable because the dismissal amounts to an adjudication on the merits.

Moreover, Mason, in filing her motion to dismiss, submitted exhibits outside of the pleadings for the trial court's consideration, thereby converting her motion to dismiss into a motion for summary judgment. Prior to ruling on Mason's motion, it is undisputed that the trial court provided no notice to either party that it was treating the motion to dismiss as a summary judgment motion. When the opposing party does not acquiesce in treating the motion as one for summary judgment, the trial court's failure to provide such notice requires reversal. Here, the Firm had a reasonable basis pursuant to Missouri law to believe that it would be given an opportunity to present evidence and argument to the Court, if Mason's motion was to be treated as a summary judgment motion.

We reverse and remand with directions to the trial court to allow Mason to re-file her motion in compliance with Missouri Supreme Court Rule 74.04(c), governing summary judgment, and to order the Firm to follow the requirements of Rule 74.04 as well.

Opinion by: Gary D. Witt, Judge

May 18, 2010

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